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13 World Wrestling Entertainment, Inc.

14 **IN THE UNITED STATES DISTRICT COURT**  
15 **FOR THE DISTRICT OF ARIZONA**

16 **Andrew Green and Staci Green**, husband and  
17 wife,

18 Plaintiffs,

19 vs.

20 **Paul D. Wight, Jr. a/k/a Big Show**, an  
21 individual, **World Wrestling Entertainment,**  
22 **Inc.**, a foreign corporation doing business in  
23 Arizona, Does 1-30, XYZ Corporations 1-30,  
24 and Black and White Partnerships 1-30,

25 Defendants.

**Case No. 2-13-cv-00967-GMS**

**RESPONSE IN OPPOSITION TO  
PLAINTIFFS' MOTION TO REMAND  
BY DEFENDANT WORLD  
WRESTLING ENTERTAINMENT, INC.**

**(Oral Argument Requested)**

25 Defendant World Wrestling Entertainment, Inc. ("WWE") respectfully submits this  
26 response in opposition (the "Opposition") to Plaintiffs' Motion to Remand.  
27  
28

1 **I. INTRODUCTION**

2 By their Motion to Remand and Amended Complaint, Plaintiffs have attempted to  
3 manipulate their pleadings in form, but not in substance, for the purpose of avoiding this  
4 Court’s jurisdiction. They have failed.

5 Conceding that their original complaint was completely preempted by federal  
6 copyright law, Plaintiffs admit in their Motion to Remand that they amended their complaint  
7 to delete the claims against WWE for invasion of privacy, commercial appropriation of  
8 likeness, unjust enrichment/restitution, and accounting/constructive trust – each of which was  
9 expressly predicated on WWE’s posting of video footage of Plaintiff Andrew Green’s  
10 interview of Defendant Paul Wight (the “Interview”) on the internet.<sup>1</sup> In doing so, Plaintiffs  
11 evidently believed that they had eliminated WWE’s basis for removal under the copyright  
12 preemption doctrine.

13 The problem for Plaintiffs, however, is that they did not delete from the Amended  
14 Complaint any of the numerous factual allegations regarding WWE’s posting of video  
15 footage of the Interview on the internet (*see* Amended Complaint ¶¶ 62-73), which are  
16 incorporated by reference into each of Plaintiffs’ claims for relief. Moreover, at least four of  
17 Plaintiffs’ causes of action against WWE – Negligence (Count Six), Intentional Infliction of  
18 Emotional Distress (“IIED,” Count Seven), Negligent Infliction of Emotional Distress  
19 (“NIED,” Count Eight), and Intentional Tort (Count Nine) – continue to be expressly based  
20 on the internet posting allegations. Significantly, Plaintiffs even concede in their Motion to  
21 Remand that the “Amended Complaint seeks damages based upon the Attack [allegedly by  
22 Wight against Mr. Green] *and the subsequent emotional damages suffered by Green as a*  
23 *result of WWE posting the Attack on the Internet.*” *See* Motion to Remand at 5 (emphasis  
24 added). It, therefore, is uncontested that Plaintiffs’ claims against WWE continue to be  
25 predicated in large part on WWE’s posting the video footage of the Interview on the internet.  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Plaintiffs also erroneously claim that their original Complaint asserted claims against  
WWE for, among other things, assault and battery. This is false – no assault or battery claim  
ever has been asserted, and is not now asserted, against WWE.

1 Because Plaintiffs admittedly continue to seek damages for WWE’s mere exploitation of its  
2 exclusive right as a copyright owner to publicly display its copyrighted work (i.e., the video  
3 footage of the interview on the internet), Plaintiffs’ claims for Negligence, IIED, NIED, and  
4 Intentional Tort remain preempted by Section 301(a) of the Copyright Act. Accordingly, this  
5 Court has subject matter jurisdiction over this case as a matter of law.

## 6 **II. ARGUMENT**

### 7 **A. WWE Properly Removed this Action Under the Complete Preemption Doctrine**

#### 8 **1. Copyright Law Is Completely Preemptive, Which Confers Federal Subject** 9 **Matter Jurisdiction for Removal**

10 It is well-established in the Ninth Circuit, that “the ‘complete preemption doctrine’  
11 provides an exception to the general proposition” that a case may not be removed to federal  
12 court on the basis of a federal defense. *In re Miles*, 430 F.3d 1083, 1088 (9th Cir. 2005).  
13 Despite attempting to muddle the issue in their Motion to Remand, Plaintiffs ultimately  
14 concede that “[u]nder the ‘artful pleading’ doctrine, a well-pleaded state law claim presents a  
15 federal question when a federal statute has completely preempted that particular area of law.  
16 See Motion to Remand at 8. Plaintiffs further concede, as they must, that “[a] complaint  
17 containing a completely preempted claim may be removed to district court under § 441 [sic].”  
18 See Motion to Remand at 8. See also *Hall v. North American Van Lines, Inc.*, 476 F.3d 683,  
19 687 (9th Cir. 2007) (“A complaint containing a completely preempted claim may be removed  
20 to district court under § 1441.”).

21 Unable to dispute the vitality of the complete preemption doctrine, on which the  
22 removal of this case was predicated, Plaintiffs are left to argue that copyright law is not a  
23 federal statute to which the complete preemption doctrine applies. Every Federal Circuit to  
24 address the issue, however, has uniformly concluded that state law claims preempted by §  
25 301 of the Copyright Act are completely preempted such that federal subject matter  
26 jurisdiction exists over those claims. See, e.g., *Globe-Ranger Corp. v. Software AG*, 691 F.3d  
27 702, 705 (5th Cir. 2012); *Ritchie v. Williams*, 395 F.3d 283, 285-87 (6th Cir. 2005);  
28 *Briarpatch Ltd., L.P. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 303-05 (2d Cir. 2004);

1 *Rosciszewski v. Arete Assocs., Inc.*, 1 F.3d 225, 230-33 (4th Cir. 1993). There is no contrary  
2 authority.

3         The U.S. Supreme Court has made clear that in determining whether a federal statute  
4 is completely preempted, “[t]he proper inquiry focuses on whether Congress intended the  
5 federal cause of action to be exclusive rather than on whether Congress intended that the  
6 cause of action be removable.” *Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 9 n.5 (2003);  
7 *see also Ritchie*, 395 F.3d at 287 (“[The Supreme Court] holds [in *Anderson*] that a state law  
8 usury claim against a national bank is ‘completely preempted’ and removable when Congress  
9 vests exclusive jurisdiction in the federal courts after broadly preempting usury claims under  
10 the National Bank Act. The rationale is that in such situations the federal statutory laws  
11 ‘superseded both the substantive and remedial provision of state’ law creating a strong form  
12 of federal preemption – presumably because of the additional need for a strong form of  
13 national uniformity implied by Congress when it made federal court jurisdiction exclusive  
14 after broadly preempting state law.”).

15         Applying this standard, the Second, Fourth, Fifth and Sixth Circuits have concluded  
16 that Congress intended the Copyright Act to entirely displace state law. *See Briarpatch*, 373  
17 F.3d at 305 (“Given the Supreme Court’s approach in *Anderson*, we conclude that it means to  
18 extend the complete preemption doctrine to any federal statute that both preempts state law  
19 and substitutes a federal remedy for that law, thereby creating an exclusive federal cause of  
20 action. The Copyright Act does just that.”) (citations omitted); *see also GlobeRanger*, 691  
21 F.3d at 706 (“We hold that Section 301(a) of the Copyright Act completely preempts the  
22 substantive field.”); *Ritchie*, 395 F.3d at 286-87 (“Most recently, the Second Circuit analyzed  
23 the [Copyright] Act in light of the *Anderson* case above and found that the doctrine of  
24 complete preemption clearly applies. . . . We agree with the Second and Fourth Circuits.  
25 Congress has indicated that ‘national uniformity’ in the strong sense of ‘complete  
26 preemption’ is necessary in this field.”); *Rosciszewski*, 1 F.3d at 231-32 (“[I]n deciding  
27 whether the preemptive force of the Copyright Act is so extraordinary that a state-law claim,  
28 preempted by § 301(a), becomes federal in nature, the focus of our inquiry must be

1 congressional intent. . . . We likewise conclude that Congress intended that actions pre-  
2 empted by § 301(a) of the Copyright Act be regarded as arising under federal law.”).

3       Specifically, these Circuits found the Copyright Act to be completely preemptive for  
4 two reasons. First,

5               Congress employed a broad mandatory preemption provision for  
6 causes of action equivalent to copyright claims. *See* 17 U.S.C.A.  
7 § 301(a). Concerning this provision, Congress has stated, “The  
8 declaration . . . in section 301 is intended to be stated in the  
9 clearest and most unequivocal language possible, so as to  
10 foreclose any conceivable misinterpretation of its unqualified  
11 intention that Congress shall act preemptively.” H.R. Rep. No.  
12 1476, 94<sup>th</sup> Cong., 2d Sess. 130 (1976), *reprinted in* 1976  
13 U.S.C.C.A.N. 5659, 5746. Thus, Congress has clearly indicated  
14 that state-law claims which come within the subject matter of  
15 copyright law and which protect rights equivalent to any of the  
16 exclusive rights within the scope of federal copyright law . . .  
17 should be litigated only as federal copyright claims.

18 *Rosciszewski*, 1 F.3d at 232; *see also Ritchie*, 395 F.3d at 285 (“Section 301 of the Copyright  
19 Act broadly preempts state law claims, and federal law vests exclusive jurisdiction over such  
20 preempted copyright claims in the federal courts.”).

21       Second, 28 U.S.C. § 1338(a) provides, in pertinent part, that “the district courts shall  
22 have original jurisdiction of any civil claims arising under any Act of Congress relating to . . .  
23 copyrights . . . Such jurisdiction shall be exclusive of the courts of the states in . . . copyright  
24 cases.” Thus,

25               [t]he Copyright Act is unusually broad in its assertion of federal  
26 authority. Rather than sharing jurisdiction with the state courts as  
27 is normally the case, the statute expressly withdraws from the  
28 state courts any jurisdiction to enforce the provisions of the Act  
and converts all state common or statutory law “within the  
general scope of copyright” into federal law to be uniformly  
applied throughout the nation.

*Ritchie*, 395 F.3d at 286; *see also Rosciszewski*, 1 F.3d at 232 (“The grant of exclusive  
jurisdiction to the federal courts over civil actions arising under the Copyright Act, combined

1 with the preemptive force of § 301(a), compels the conclusion that Congress intended that  
2 state law actions preempted by § 301(a) of the Copyright Act arise under federal law.  
3 Accordingly, we hold that the preemptive force of § 301(a) of the Copyright Act transforms a  
4 state-law complaint asserting claims that are preempted by § 301(a) into a complaint stating a  
5 federal claim for purposes of the well-pleaded complaint rule. Since claims preempted by §  
6 301(a) arise under federal law, removal of actions raising these claims to federal district court  
7 is proper.”).

8 This reasoning equally applies here. Given the Copyright Act’s broad mandatory  
9 preemption for any causes of action within the general scope of copyright and the exclusive  
10 federal jurisdiction over copyright claims, it is evident that Congress intended the Copyright  
11 Act to entirely displace equivalent state law. As such, the Copyright Act is completely  
12 preemptive, as uniformly found by every Circuit to address the issue. This Court, therefore,  
13 plainly has federal question subject matter jurisdiction over this lawsuit.

14 **2. Plaintiffs’ Argument that Copyright Law Is Not Completely Preempted Is**  
15 **Unfounded and Unavailing**

16 Forced to acknowledge the foregoing precedent, Plaintiffs attempt to diminish its  
17 import by inventing a purported circuit split based solely on an unpublished Third Circuit  
18 opinion in *Bd. of Chosen Freeholders of Cnty. Of Burlington v. Tombs*, 215 Fed. 80, 82 (3d  
19 Cir. 2006) supposedly holding to the contrary. Plaintiffs assert that “the Third Circuit has  
20 expressly declined” to endorse the notion that copyright law is completely preempted. *See*  
21 *Motion to Remand* at 9. This assertion is based on a misreading of *Tombs*, or perhaps blind  
22 reliance on a commentator’s misreading of *Tombs* in the Copyright Litigation Handbook §  
23 10:1 (2d ed.). As the Fifth Circuit cogently explained with regard to this very issue in  
24 *GlobeRanger*:

25 One commentator notes, citing *Tombs*, that the Third Circuit has  
26 “rejected complete preemption in the copyright context.”  
27 Copyright Litigation Handbook § 10:1 (2d ed.). It is correct that  
28 *Tombs* rejected the application of preemption to a specific cause  
of action. *Tombs* did not reject, however, complete preemption  
generally under the Copyright Act.

1 *GlobeRanger*, 691 F.3d at 706 n.2. Indeed, *Tombs* merely held that “[f]ederal copyright law  
2 does not create an exclusive cause of action for access to public records and does not set forth  
3 procedures and remedies governing such actions. Simply stated, federal copyright law does  
4 not wholly displace state statutory or common law rights to public records and therefore  
5 cannot be said to completely preempt *Tombs*’ threatened claim.” *Tombs*, 215 Fed. Appx. at  
6 82. Thus, *Tombs* stands for nothing more than the unremarkable – and narrow – proposition  
7 that a claim under New Jersey’s Open Public Records Act is not preempted by copyright law.  
8 It, therefore, has no application here.

9 Equally unavailing is Plaintiffs’ suggestion that “[t]he Ninth Circuit has clearly  
10 signaled its reluctance to add federal copyright claims to those limited statutes which compel  
11 complete preemption.” See Motion to Remand at 11 (citing *Bierman v. Toshiba Corp.*, 473  
12 Fed. Appx. 756 (9th Cir. 2012)). The apparent basis for Plaintiffs’ assertion is that “while the  
13 District Court seemingly signaled its approval of the complete preemption doctrine in  
14 *Bierman*, on appeal the Ninth Circuit declined the District Court’s tacit invitation to extend  
15 the concept to federal copyright law, instead affirming the District Court’s decision on other  
16 grounds.” *Id.* at 10-11. This assertion is demonstrably false.

17 As discussed in WWE’s Notice of Removal, *Bierman* was removed to federal court on  
18 the grounds that the state law claims at issue were completely preempted by the Copyright  
19 Act. See *Bierman v. Toshiba Corp.*, No. C-10-4203 MMC, 2010 WL 4716879, at \*1 (N.D.  
20 Cal. Nov. 12, 2010). In fact, the district court specifically cited *Ritchie*, *Briarpatch*, and  
21 *Rosciszewski* and stated, “[t]he Court finds the reasoning of such cases to be persuasive.” *Id.*  
22 at \*1 n.1. On appeal, the Ninth Circuit did not take issue with the district court’s assertion of  
23 subject matter jurisdiction on the basis of complete preemption under the Copyright Act or its  
24 dismissal of two causes of action as preempted by Section 301 of the Copyright Act.  
25 Meanwhile, the concurring opinion by Senior Circuit Judge Wallace noted that while the  
26 majority did not directly address the propriety of the district court’s federal subject matter  
27 jurisdiction to dismiss the claims as preempted, he “would have joined the Second, Fourth,  
28 and Sixth Circuits in holding that claims preempted by § 301(a) of the Copyright Act are

1 regarded as arising under federal law, and therefore can support removal.” *See Bierman*, 473  
2 Fed. Appx. at 757-58.

3 Contrary to Plaintiffs’ assertion that the Ninth Circuit affirmed the district court  
4 decision on other grounds, as noted in Senior Circuit Judge Wallace’s concurrence, the Ninth  
5 Circuit was not asked to review the district court’s merits decision dismissing portions of two  
6 causes of action as preempted because the plaintiff did not appeal that decision. *See Bierman*  
7 473 Fed. Appx. at 758. The only issue on appeal (by the defendant) was whether the district  
8 court abused its discretion in declining to exercise supplemental jurisdiction, in the absence of  
9 any claims subject to copyright preemption, over the remaining state law claims. Indeed, the  
10 majority opinion made clear that it “express[ed] no view as to whether there was any federal  
11 subject matter jurisdiction in the first place for the district [court] to exercise federal  
12 jurisdiction over the two claims which were dismissed.” *Bierman*, 473 Fed. Appx. at 757 n.1.  
13 By “express[ing] no view” in this regard, it is utterly baseless for Plaintiffs to claim that the  
14 Ninth Circuit “signaled” anything about whether copyright law is completely preempted. The  
15 only statement from the Ninth Circuit as to whether copyright law is completely preempted is  
16 Senior Circuit Judge Wallace’s concurrence emphatically finding that it is.

17 Finally, as regards Plaintiffs’ assertion that the facts in *Bierman* are “remarkably  
18 similar to this case” and supposedly “[n]o discernible issues remain which are arguably based  
19 upon federal copyright law,” this again is demonstrably false. As noted at the outset,  
20 Plaintiffs ignore that the Amended Complaint continues to assert numerous factual  
21 allegations regarding WWE’s posting of the video footage of the Interview on the internet  
22 (*see* Amended Complaint ¶¶ 62-73) and Plaintiffs’ claims for Negligence, IIED, NIED, and  
23 Intentional Tort continue to be expressly based on WWE’s posting of the video footage of the  
24 Interview on the internet. Plaintiffs even concede in their Motion to Remand that the  
25 “Amended Complaint seeks damages based upon the Attack [allegedly by Wight against Mr.  
26 Green] **and the subsequent emotional damages suffered by Green as a result of WWE**  
27 **posting the Attack on the Internet.**” *See* Motion to Remand at 5 (emphasis added). Thus,  
28 unlike *Bierman* where all of the preempted claims were dismissed, Plaintiffs’ claims against

1 WWE continue to be predicated in large part on WWE’s posting the video footage of the  
2 Interview on the internet which are preempted by copyright law. The facts of *Bierman*,  
3 therefore, are completely inapposite.

4  
5 **B. Plaintiffs’ State Law Claims Predicated on WWE Allegedly Posting and**  
6 **Maintaining on Its Website Video Footage of the Interview Are Preempted By**  
7 **Federal Copyright Law**

8 Plaintiffs’ Motion to Remand demonstrates a fundamental misunderstanding of  
9 copyright preemption. Plaintiffs assert in their Motion to Remand that “[t]his action centers  
10 upon the unauthorized, violent Attack upon Green, the physical and emotional damages that  
11 it caused, and the emotional distress suffered by Green once that Attack was posted by  
12 WWE on the Internet. Those claims are grounded in tort not in copyright law. . . . WWE has  
13 distorted Plaintiffs’ claims in order to create the impression that this action involves federal  
14 copyright claims which are preempted by federal courts.” *See* Motion to Remand at 5.  
15 While in reality WWE has distorted nothing, it does not matter for purposes of copyright  
16 preemption whether Plaintiffs’ claims ostensibly are grounded in tort.

17 Section 301(a) of the Copyright Act prohibits States –by statute or common law –  
18 from regulating in the area of copyright. *See* 17 U.S.C. § 301(a). According to the Ninth  
19 Circuit,

20 Section 301 of the [Copyright] Act provides for exclusive  
21 jurisdiction over rights that are equivalent to any of the exclusive  
22 rights within the general scope of copyright as specified in the  
23 Act. “The intention of Section 301 is to preempt and abolish any  
24 rights under the common law or statutes of a State that are  
25 equivalent to copyright and that extend to works within the scope  
26 of Federal copyright law.”

27 *Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1152 (9th Cir. 2010). To  
28 that end, the Ninth Circuit has

adopted a two-part test to determine whether a state law claim is  
preempted by the Act. We must first determine whether the  
“subject matter” of the state law claim falls within the subject

1 matter of copyright as described in 17 U.S.C. §§ 102 and 103.  
2 Second, assuming that it does, we must determine whether the  
3 rights asserted under state law are equivalent to the rights  
4 contained in 17 U.S.C. § 106, which articulates the exclusive  
5 rights of copyright holders.

6 *Id.* at 1152-53 (quoting *Laws v. Sony Music Entm't, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir.  
7 2006)). “A claim asserted to prevent nothing more than the reproduction, performance,  
8 distribution, or display of a dramatic performance captured on film is subsumed by copyright  
9 law and preempted.” *Fleet v. CBS, Inc.*, 50 Cal. App. 4<sup>th</sup> 1911, 1924 (1996), *cited with*  
10 *approval in Jules Jordan Video*, 617 F.3d at 1154 & *Laws*, 448 F.3d at 1142-43. Here,  
11 Plaintiffs’ state law claims for negligence, IIED, NIED, and intentional tort are expressly  
12 predicated on WWE’s display of the video footage of the Interview on its website. Such  
13 claims, therefore, directly impinge upon WWE’s exclusive rights under Section 106 of the  
14 Copyright Act to, among other things, perform and/or display the copyrighted work publicly.  
15 As such, those claims are preempted.

16 **1. The Subject Matter of Plaintiffs’ Negligence, IIED, NIED and Intentional**  
17 **Tort Claims Fall Within the Subject Matter of Copyright**

18 With regard to the first prong of the preemption analysis, the video footage of the  
19 Interview at issue is a copyrighted work that is exclusively owned by WWE. 17 U.S.C. §  
20 102(6) provides that “[c]opyright protection subsists . . . in original works of authorship fixed  
21 in any tangible medium of expression . . . [including] motion pictures and other audiovisual  
22 works.” It is indisputable that the video footage of the Interview is such an audiovisual work  
23 under Section 102 of the Copyright Act. Plaintiffs further do not and cannot dispute that  
24 WWE is the exclusive owner of the copyright in the video footage of the Interview.

25 Plaintiffs admit in their Complaint and Amended Complaint that Mr. Green “was at  
26 all times material hereto employed by WWE as a road producer for digital production. His  
27 job was to conduct interviews with WWE wrestlers after wrestling matches/exhibitions.”  
28 *See* Complaint ¶ 6. Thus, as a matter of copyright law, the video footage of the Interview at  
issue was a work made for hire, the copyright in which is owned by WWE as Green’s

1 employer. *See* 17 U.S.C. §§ 101 (“A ‘work for hire’ is (1) a work prepared by an employee  
2 within the scope of his or her employment . . . .”) & 201(b) (“In the case of a work made for  
3 hire, the employer or other person for whom the work was prepared is considered the author  
4 for purposes of this title, and, unless the parties have expressly agreed otherwise in a written  
5 instrument signed by them, owns all of the rights comprised in the copyright.”).

6 Additionally, Mr. Green expressly agreed that WWE owns the copyright in the  
7 Interview pursuant to an “Intellectual Property Release and Waiver” he entered into in  
8 connection with his employment for WWE. It provides, in pertinent part:

9  
10 The undersigned certifies that he/she may be photographed,  
11 videotaped or otherwise recorded by WWE in connection with  
12 his/her employment (“Footage”). The undersigned grants WWE  
13 the sole and exclusive right, including the right to authorize  
14 others, to use and incorporate the Footage, in whole or in part, in  
15 conjunction with other photographs and footage and the right to  
16 use the undersigned’s name, voice, likeness and/or biographical  
17 information (collectively, “Likeness”) in connection with the  
18 exploitation, advertising, promotion and/or packaging of the  
19 Footage and/or any other product into which the Footage may be  
20 incorporated, including but not limited to, radio, television,  
21 Internet, home video or other motion picture programs or sound  
22 recordings (“Products”) at such times and in such manner as  
23 WWE may elect in perpetuity throughout the world, and to  
24 broadcast, exhibit and/or exploit the same in any and all media,  
25 whether now or hereafter known or devised.

26 \* \* \*

27 The undersigned further acknowledges and agrees . . . that the  
28 undersigned shall not be entitled to any further payments,  
residuals, monies or other compensation other than the  
undersigned’s regular salary arising out of WWE’s exploitation of  
the Footage and/or Likeness in any manner; that the undersigned,  
on behalf of his/her heirs, successors and assigns, hereby releases,  
discharges and agrees to save and hold harmless WWE and/or its  
assignee from any and all claims of liability arising out of any use  
of the Footage and/or Products; and that the Footage shall be the  
sole and exclusive property of WWE in perpetuity. In this regard,  
the Footage shall be deemed created for the benefit of WWE to  
qualify as a Work for Hire as defined by the Copyright Act of

1 1976. To the extent the Footage is deemed not to qualify as Work  
2 for Hire, the undersigned herewith assigns to WWE all right, title  
3 and interest throughout the world, in the copyright in the Footage  
4 for the full duration of all such rights, and any renewals or  
5 extensions thereof; including but not limited to the exclusive right  
6 to enforce, and to obtain registrations of, the copyrights in the  
7 Footage in the United States and throughout the world.

8 *See* Ex. 1 to WWE’s Notice of Removal. In their Motion to Remand, Plaintiffs curiously  
9 assert that this release somehow is inapplicable to the interview at issue because, according to  
10 Plaintiffs, WWE’s rights under the release supposedly “are limited to circumstances where  
11 Green was photographed or videotaped ‘in connection with his employment’” and Wight’s  
12 alleged attack on Mr. Green “was outside the scope of Green’s employment.” *See* Motion to  
13 Remand at 6-7. This is pure sophistry. As noted above, Plaintiffs admit in their Complaint  
14 that Mr. Green’s job was to conduct interviews with WWE wrestlers after wrestling  
15 matches/exhibitions,” *see* Complaint at ¶ 6, and, with regard to the interview at issue, “Green  
16 asked Big Show to participate in the videotaped interview as planned at the Phoenix  
17 Production Meeting.” *Id.* at ¶ 39. Undeniably, therefore, the video footage of the Interview  
18 was created in connection with Green’s employment. Indeed, that is the only reason that a  
19 *WWE camera operator videotaped Green in his capacity as a WWE employee interviewing a*  
20 *WWE wrestler backstage at a WWE event following a WWE wrestling match.* Plaintiffs’  
21 assertion to the contrary is disingenuous, to say the least.

22 It also is highly incongruous that Green would have filed a workers’ compensation  
23 claim against WWE in Connecticut and asserted claims against WWE for Negligent Hiring,  
24 Negligent Retention, and Negligent Training/Supervision in this action for an alleged attack  
25 that Plaintiffs now assert “was outside the scope of Green’s employment.” *See* Motion to  
26 Remand at 7. This assertion is fatal to those claims and mandates their dismissal when the  
27 time comes for WWE to respond to Plaintiffs’ Amended Complaint.

28 **2. Plaintiffs’ Negligence, IIED, NIED, and Intentional Tort Claims Directly Impinge Upon WWE’s Exclusive Rights Under Section 106 of the Copyright Act**

1 With regard to the second prong of the preemption analysis, “a right is equivalent to  
2 rights within the exclusive province of copyright when it is infringed by the mere act of  
3 reproducing, performing, distributing, or displaying the work at issue.” *Fleet*, 50 Cal. App.  
4 4th at 1924; *see also Baltimore Orioles, Inc. v. MLB Players Assoc.*, 805 F.2d 663, 676 (7th  
5 Cir. 1986) (“A right under state law is ‘equivalent’ to one of the rights within the general  
6 scope of copyright if it is violated by the exercise of any of the rights set forth in § 106.”).  
7 Thus, “[t]o survive preemption, the state cause of action must protect rights which are  
8 qualitatively different from the copyright rights.” *Laws*, 448 F.3d at 1143; *see also Harper*  
9 *& Row Publishers, Inc. v. Nation Enterprises*, 501 F. Supp. 848, 852 (S.D.N.Y. 1980), *rev’d*  
10 *on other grounds*, 471 U.S. 539 (1985) (“The state cause of action must protect rights . . .  
11 which are qualitatively different from the rights of reproduction, performance, distribution,  
12 or display.”). Here, Plaintiffs’ state law claims involve nothing more than an attempt to  
13 interfere with WWE’s exercise of its exclusive right under § 106 of the Copyright Act to  
14 publicly perform and/or display the video footage of the Interview on its website. Such  
15 claims plainly are preempted by copyright law.

16 It is well-settled both in the Ninth Circuit and elsewhere that where a plaintiff  
17 consents to being filmed – as Green did here – only to later bring state law claims based on  
18 the reproduction, distribution and/or public performance or display of the defendant’s  
19 lawfully-owned copyrighted work, the plaintiff’s claims are preempted by federal copyright  
20 law. *See, e.g., Jules Jordan*, 617 F.3d at 1153-55; (essence of performer’s right of publicity  
21 claim was that “defendants reproduced and distributed the DVDs without authorization,” and  
22 thus, claim was preempted by the Copyright Act); *Baltimore Orioles*, 805 F.2d at 676-79  
23 (players’ right of publicity claims preempted where they consented to the fixation of their  
24 performances in a copyrightable form); *Fleet*, 50 Cal.App.4th at 1919 (finding actors’ right  
25 of publicity claim “seek[ing] only to prevent CBS from reproducing and distributing their  
26 performances in the film . . . must be preempted by federal copyright law”); *Ahn v. Midway*  
27 *Manufacturing Co.*, 965 F. Supp. 1134, 1137-38 (N.D. Ill. 1997) (right of publicity claims  
28

1 preempted where plaintiffs signed releases consenting to being videotaped for use of their  
2 likeness in creating “Mortal Kombat” videogame).

3         Significantly, WWE has previously succeeded in foreclosing such baseless and  
4 preempted claims by prior plaintiffs seeking to interfere with WWE’s copyrights. *See*  
5 *Somerson v. Vincent K McMahon, Linda E. McMahon and World Wrestling Entertainment,*  
6 *Inc.*, C.A. No. 1:12-cv-00043-MHS, at \*\*21-22 (N.D. Ga. August 24, 2012) (granting  
7 WWE’s motion to dismiss plaintiff’s claims for violation of his right to publicity and  
8 invasion of privacy based on WWE reproducing video recordings depicting plaintiff,  
9 preparing derivative works based on video recordings of plaintiff, and distributing copies of  
10 video recordings of these video recordings, as preempted by the Copyright Act); *Blood v.*  
11 *Titan Sports Inc.*, No. 3-94-CV-307 P, at \*19 (W.D.N.C. May 13, 1997) (granting WWE  
12 summary judgment because plaintiff’s state law claims for misappropriation of name and  
13 likeness in violation of his right of publicity, invasion of privacy, unfair trade practices,  
14 unfair competition, and unjust enrichment were preempted by Copyright Act which  
15 governed videocassette tapes at issue).

16         Likewise, the specific state law causes of action remaining in Plaintiffs’ Amended  
17 Complaint are preempted by copyright law:

18         **Negligence Claims:** Green’s negligence claims are predicated on WWE’s posting and  
19 maintaining the copyrighted footage of the Interview on the internet. *See* Complaint ¶ 129  
20 (“WWE knew or should have known that posting the Attack on the internet involved an  
21 unreasonable risk of causing mental harm to Green.”); *id.* at ¶ 130 (“WWE knew or should  
22 have known that maintaining the Attack on the internet involved an unreasonable risk of  
23 causing mental harm to Green.”). Courts in this Circuit have consistently found negligence  
24 claims based on the reproduction, distribution and/or public performance or display of  
25 copyrighted material to be preempted. *See Dielsi v. Falk*, 916 F. Supp. 985, 992 (C.D. Cal.  
26 1996) (finding copyright preemption of negligence claim “[b]ecause the essential allegation is  
27 still that Defendants unlawfully copied Plaintiff’s ideas”); *AF Holdings, LLC v. Doe*, No.  
28 5:12–CV–02048–EJD, 2012 WL 4747170, at \*3 (N.D. Cal. Oct. 3, 2012) (negligence claim

1 preempted where it was predicated on reproduction and distribution of copyrighted video);  
2 *Felix Cat Prods. Inc. v. New Line Cinema*, No. CV 99–9339 FMC (RCx), 2000 WL 770481,  
3 at \*5 (C.D. Cal. Apr. 28, 2000) (finding copyright preemption where alleged use of plaintiff’s  
4 mark in defendants’ film is the basis for plaintiff’s negligence claim); *AF Holdings LLC v.*  
5 *Rogers*, No. 12cv1519 BTM(BLM), 2013 WL 358292, at \*3 (S.D. Cal. Jan. 29, 2013)  
6 (negligence claim preempted where it “rests on the theory that Defendant allowed someone  
7 else to use his internet connection even though Defendant knew or had reason to know that  
8 the individual was infringing Plaintiff’s copyright”).

9 **Emotional Distress Claims:** Green’s claims for negligent and intentional infliction of  
10 emotional distress again are predicated on WWE posting and maintaining video footage of  
11 the Interview on its website. *See* Complaint ¶ 135 (“WWE knowingly, intentionally and/or  
12 recklessly caused the Attack to be posted on the Internet.”); *id.* at ¶ 136 (“WWE knowingly,  
13 intentionally and/or recklessly caused the Attack to be maintained on the Internet.”); *id.* at ¶  
14 137 (“WWE knew or should have known that there was a substantial likelihood that Green  
15 would suffer injuries from the posting of the videotape on the Internet.”); *id.* at ¶ 141 (“WWE  
16 knew or should have known that its conduct [in posting and maintaining the Attack on the  
17 Internet] involved an unreasonable risk of causing emotional distress to Green.”). Courts  
18 throughout the United States, including this Court, have found emotional distress claims  
19 based on the reproduction, distribution and/or public performance or display of copyrighted  
20 material to be preempted. *See Giddings v. Vison House Production, Inc.*, No. CV 05–2963–  
21 PHX–MHM, 2007 WL 2274800, at \*3 (D. Ariz. Aug. 7, 2007) (finding “the extreme and  
22 outrageous conduct that Plaintiff relies upon to establish her emotional distress claim is  
23 Defendants’ unlawful reproduction, sales, distribution, and forgery of Plaintiff’s copyrighted  
24 art” and “[s]ince Plaintiff’s emotional distress claim does not consist of any extra elements  
25 not found in the copyright infringement claim, Plaintiff’s intentional infliction of emotional  
26 distress cause of action is preempted”); *see also Rainy v. Wayne State Univ.*, 26 F. Supp. 2d  
27 963, 969 (E.D. Mich. 1998) (finding preemption since “[u]ltimately, the only substantive  
28 issue to be resolved in plaintiff’s intentional infliction of emotional distress claim is whether

1 defendants reproduced her work without her permission. The Copyright Act provides  
2 equivalent protection for this alleged wrong.”); *Griggs v. South Carolina Elec. & Gas Co.*,  
3 463 S.E.2d 608, 610 (S.C. 1995) (finding claim for intentional infliction of emotional distress  
4 (outrage) preempted where it stems from the unauthorized publication of plaintiff’s recipe in  
5 a cookbook).

6 **Intentional Tort Claim:** Green’s claim of “intentional tort” is also called “prima  
7 facie tort” under the definition set forth in the Restatement (Second) of Torts § 870 (Liability  
8 For Intended Consequences—General Principle) (1979) – “One who intentionally causes  
9 injury to another is subject to liability to the other for that injury, if his conduct is generally  
10 culpable and not justifiable under the circumstances. This liability may be imposed although  
11 the actor’s conduct does not come within a traditional category of tort liability.” *See, e.g.*,  
12 *Brumfield v. Sanders*, 232 F.3d 376, 382 (3d Cir. 2000) (“The primary and final issue in this  
13 appeal is Brumfield's contention that under Pennsylvania law, the individual defendants  
14 committed an intentional tort as defined in Section 870 of the Restatement (Second) of Torts  
15 and the District Court therefore erred in dismissing his complaint. . . . The District Court  
16 rejected his objection, predicting that when faced with the question, the Pennsylvania  
17 Supreme Court would not recognize a cause of action for intentional or prima facie tort as set  
18 forth in the Restatement.”); *Chen v. U.S.*, 854 F.2d 622, 627 (2d Cir. 1988) (“In New York,  
19 causes of action for intentional tort and prima facie tort share common elements”).<sup>2</sup>

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21 <sup>2</sup> Although generally subject to preemption, intentional or prima facie tort is not a cause  
22 of action that is even recognized in these circumstances by either Connecticut or Arizona law.  
23 Under Arizona law, the prima facie tort cause of action simply does not exist. *See Lips v.*  
24 *Scottsdale Healthcare Corp.*, 214 P.3d 434, 440 at n.8 (2009) *aff’d in part, vacated in part on*  
25 *other grounds*, 229 P.3d 1008 (Ariz. 2010) (“The prima facie tort is described by the  
26 Restatement (Second) of Torts § 870 (1979) . . . Arizona has not adopted this principle.”). In  
27 Connecticut, “[i]t is not entirely clear whether the appellate courts of this state would  
28 recognize prima facie tort as a viable cause of action.” *Deutsch v. Backus Corp.*, No.  
X07CV106022074S, 2012 WL 1871398, at \*10 (Conn. Super. Ct. May 2, 2012). Even if it  
were recognized as a cause of action in Connecticut, however, it is clear that the claim cannot  
be maintained where the plaintiff also has available a traditional tort theory of recovery. *See*  
*id.* at \*13 (granting motion to strike a count for prima facie tort, since “multiple traditional  
torts cover the defendants’ alleged conduct . . .”); *Choy v. Boyne*, No. CV065005693, 2006  
WL 3692067, at \*1 (Conn. Super. Ct. Nov. 30, 2006) (granting motion to strike prima facie  
tort since alleged conduct fell within traditional tort of defamation); *Ballard v. Hartford Life*  
*Ins. Co.*, No. CV 09 5031857, 2011 WL 522793, at \*5 (Conn. Super. Ct. Jan.18, 2011) (“[i]n

1 Plaintiffs' intentional tort claim here once more is premised upon WWE posting of  
2 video footage of the Interview on the Internet. *See* Complaint ¶ 146 ("WWE intentionally  
3 posted the videotape on the Internet."); *id.* at ¶ 147 ("WWE knew that there was a substantial  
4 likelihood that Green would suffer injuries from the posting of the videotape."); *id.* at ¶ 148  
5 ("WWE intended for Green to suffer injuries, including humiliation, as a result of the posting  
6 of the videotape on the Internet."). Regardless of the label, intentional or prima facie tort  
7 claims equally have been found preempted by copyright law. *See, e.g., Suid v. Newsweek*  
8 *Magazine*, 503 F. Supp. 146, 149 (D.D.C. 1980) ("Plaintiff claims that Newsweek's use of  
9 material from his book constitutes unfair competition and prima facie tort at common law.  
10 However, these claims are preempted by the Copyright Act of 1976."). Pertinently, the court  
11 ruled that the claim did not allege "an additional element, separate from the act of  
12 reproduction and outside the general scope of copyright."

13 In sum, Plaintiffs' negligence IIED, NIED, and intentional tort claims satisfy both  
14 parts of the Ninth Circuit's two-part test for establishing copyright preemption. Accordingly,  
15 this Court properly has jurisdiction over such claims pursuant to the complete preemption  
16 doctrine and the Court can exercise supplemental jurisdiction over the balance of the claims  
17 alleged in Plaintiffs' Amended Complaint.

### 18 **III. CONCLUSION**

19 For all of the foregoing reasons, Plaintiffs' Motion to Remand should be denied and  
20 the Court should grant WWE such other and further relief as the Court deems just and  
21 appropriate.

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27 order to assert the prima facie tort, however, no other traditional torts must be available for  
28 the plaintiff to assert"). Because Plaintiffs have asserted causes of action for other traditional  
torts (e.g., negligence and intentional/negligent infliction of emotional distress) in this  
lawsuit, a claim for intentional or prima facie tort cannot lie under any circumstances.

1 RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of June, 2013.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 27, 2013, I electronically transmitted the foregoing Response in Opposition to Plaintiff’s Motion to Remand by Defendant World Wrestling Entertainment, Inc. to the Clerk’s Office of the United States District Court for the District of Arizona, using the CM/ECF System for filing and transmittal of a Notice of Electronic filing to the following recipient:

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By /s/ Melissa Avila \_\_\_\_\_